Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

In re SIDNEY GELB, Petitioner

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND THE HONORABLE LAURENCE H. SILBERMAN, DOUGLAS H. GINSBURG, AND A. RAYMOND RANDOLPH.

On Petition For Writ of Mandamus, to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR A WRIT OF MANDAMUS

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24 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in not providing petitioner with a timely copy of the order denying a rehearing, interfere with his appeal rights to the Supreme Court?

2. Did the Court of Appeals block petitioner's right to file a writ of certiorari, that complained of the lower courts factual errors, agency violations of statutes and case laws issued by this Court, by refusing to recall the mandate?

PARTIES

The parties to the proceedings below were:

Sidney Gelb,

Plaintiff in the District Court,
Plaintiff-Appellant in the Court of Appeals.

Donna Shalala, Secretary of the
Department of Health and Human Services

Defendant in the District Court,
Defendant-Appellee in the Court of Appeals

In this petition, the three court of appeals judges, Silberman, Ginsburg and Randolph.

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IN THE

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OCTOBER TERM 1996

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In re SIDNEY GELB, Petitioner

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND THE HONORABLE LAURENCE H. SILBERMAN, DOUGLAS H. GINSBURG, AND A. RAYMOND RANDOLPH.

On Petition For Writ of Mandamus, to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR A WRIT OF MANDAMUS

Petitioner, Sidney Gelb, respectfully prays that a writ of mandamus issue to review the denial to recall the mandate order of the Court of Appeals for the District of Columbia Circuit entered in the proceeding on February 21, 1997.

Opinions Below

The order of the United States Court of Appeals for the District of Columbia Circuit is unreported and is set out at pages 1a of the Appendix hereto ("App."). The denial for rehearing is unreported and is set out at App. 2a. The order granting summary affirmance is unreported and is set out at App. 3a. The District Court jury trial denial is set out at App. 5a.

JURISDICTION

The order of the Court of Appeals for the District of Columbia was entered on February 21, 1997. Jurisdiction of this Court is invoked under 28 U.S.C. 1651 (a). Jurisdiction of this Court is also invoked under 28 U.S.C. 1254 (I).

Legal Provisions Involved

Improper denial of a jury trial permitted by Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, (Title VII); Age discrimination prohibited by the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. et seq.,(ADEA); retaliation, 29 U.S.C. 623(d) and property interest protected by the Fifth amendment of the Constitution.

Statement Of The Case

This case is an employment discrimination suit brought against the Secretary of the Department of Health and Human Services by a civil service employee terminated at age 52 following a history of fully satisfactory employment evaluations and promotions. Petitioner, Sidney Gelb planned on working until age 65. Plaintiff-petitioner, Sidney Gelb, alleged violation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972; and 1991, ("Title VII"); the Civil Service Reform Act, 5 U.S.C. 1101 et seq., ("CSRA"); and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 et seq. and 29 CFR 1613.607-freedom from restraint, interference, coercion and reprisal, ("ADEA"). Jurisdiction over this case in the district court was conferred by 28 U.S.C. 1331 and 1343. See 5 U.S.C. 7702(c)(1).

This case deals with a series of illegal agency personnel actions that were not corrected by a law suit, as the district court and court of appeals failed to enforce the statutes and case law that protected petitioner from such illegal termination. The district court granted the agency summary judgement on most of the supervisors' violations covered by the CSRA, Title VII and ADEA; and also denied a de novo jury trial. The appeals court denied his right to file an appeals brief by granting summary affirmance. The appeals court denied petitioner's pro se motion for rehearing; but failed to timely notify petitioner of this order.

A. Errors of Appeals Court

The district court's bench decision not to return petitioner to his job was issued on May 30, 1995. Petitioner filed a notice of appeal to the appeals court. On July 25, 1996, Judges Silberman, Ginsburg and Randolph granted summary affirmance to the agency denying petitioner his appeal.

Petitioners filed a pro se petition for rehearing stating that the district court decision was wrong, the decision had appealable issues and that the judge failed to grant a jury trial. On November 21, 1991 the Civil rights Act of 1991 was signed into law providing trial by jury. This also applied to ADEA issues. Petitioner filed this case at the district court on June 23, 1992, eight (8) months after the law was enacted and expected a jury trial.

Under Title VII petitioner is entitled to a jury trial. Bridges v. Eastman Kodak Co. et al No. 91 CIV 7985 (HLC). In Bridges, the court held that the act authorizes awards of compensating damages and jury trials in Title VII action and will be applied to conduct occurring before effective date of the 1991 act. ADEA actions are also covered.

The appeals court denied the pro se petition for rehearing on September 20, 1996. Petitioner never received a copy of this order, as it was sent to his former attorney. Petitioner learned of the denial for rehearing on November 5, 1996, by calling the appeals court. The appeals court knew that petitioners motion was filed pro se, yet mailed the decision to his former attorney. His former attorney, thinking he had no work to do, did not send petitioner a copy of the order. The appeals court

failure of notice harmed petitioner's attempt to file a timely writ of certiorari in this Court.

Appellant was told by the clerk that an order-decision received November 5, 1996 permitted him to file a writ of certiorari to the Supreme Court by February 3, 1997. Petitioner filed his writ of certiorari with the clerk of this Court on January 17, 1997. The Supreme Court clerk returned the writ of certiorari as time barred. The clerk said the appeals court order issued September 20, 1996 was the start date to calculate the time, 90-day interval to file the writ, not the November 5, 1996 date when the court of appeals clerk informed petitioner of the appeals court decision.

The supreme court clerk said a corrected order from the court of appeals was needed to permit the writ of certiorari to be filed timely. Petitioner did not get the notice he was supposed to receive. When asked to revise the order or reissue the order, the appeals court clerk refused to assist petitioner to comply with the time period set by the supreme court clerk. The appeals court clerk did not issue a proper timely notice.

B. Court of Appeals Denies Motion To Recall The Mandate

Petitioner filed a motion to correct the record, non-notification of order, motion to recall the mandate. This motion to recall the mandate and have a proper order issued was necessary for petitioner's writ of certiorari to be timely filed in this Court.

On February 21, 1997, the appeals court denied the motion to recall the mandate. This denial to recall the

mandate blocked petitioner's right file a timely writ of certiorari . The appeals court failure of notice, by not issuing a timely notice and then failing to recall the notice mandate blocked petitioner's right to seek corrective appellate action in the form of a writ of certiorari.

REASONS FOR GRANTING THE WRIT OF MANDAMUS

I. Granting the writ will be an aid of this Court's appellate jurisdiction as there are exceptional circumstances warranting the exercise of the Court's discretionary powers.

The errors of fact and law of the district court and the court of appeals are so compelling as to warrant a writ of mandamus to order the court of appeals to issue a proper timely mandate. A proper mandate order will permit this Court to review a writ of certiorari whereby the petitioner requests this Court to vacate the district courts bench decision of summary judgement as erroneous. The district court's decision to deny petitioner a de novo jury trial with witnesses was wrong. The district court judge failed to enforce the applicable statutes by granting summary judgement to the agency.

The court of appeals summary affirmance decision was wrong, as it denied petitioner his appeals rights. Adequate relief cannot be obtained in any other form or from any other court. There is no equitable remedy in the court of appeals to correct the district court's procedural, reversible errors and errors of law.

A three judge panel should have been convened at

the court of appeals to hear these issues. A writ of mandamus may be issued by the U.S. Supreme Court where a three judge panel should have been convened, and was not to vacate the order of the district judge and to direct the appropriate action. Stratton v. St. Louis S.R. Co. (1930) 282 US 10, 75 L. Ed 135, 51 S Ct 8. Petitioner expected the court of appeals to vacate the district court's decision and return him to his former job.

II. Adequate relief cannot be obtained in any form or from any other court.

As shown above, petitioners attempt to appeal was an inadequate remedy. The court of appeals denied petitioners right to appeal by granting summary affirmance to the agency. The district court's denied petitioner a de novo jury trial with his attorney and witnesses, by granting the agency summary judgement. The issues of age discrimination, and reprisal under ADEA; religious discrimination under Title VII were never properly adjudicated before a jury. This court is the only court that has the authority and ability to correct.

The agency supervisors outrageous conduct toward appellant was not corrected. All transfer attempts were blocked and he was illegally fired. The court of appeals denied petitioner access to the appeals process by granting summary affirmance. The court of appeals then failed to notify petitioner of the denial of a rehearing motion.

The court of appeals obstruction of petitioners filing his writ of certiorari defeats the appellate jurisdiction of this court. The abuse of discretion is so aggravated and the absence of other adequate remedy so apparent, as to

induce this Court to grant a writ.

This Court has stated that "the right to grant mandamus to require a jury trial where it has been improperly denied is settled." Beacon Theaters v. Westover, 359 U.S. 500, 511 (1959). This writ will permit this Court under its appellate power to review a writ of certiorari that questions the lower court's denial of a de novo jury trial and the errors of law.

The district court order conflicts with the clear and repeated teaching of the other circuits and this Court. If left uncorrected, it will deny petitioner his basic legal rights. The appellate jurisdiction of the supreme court would be defeated by the court of appeals action.

It is in the public interest for this Court to provide uniformity of application of these important laws. The decision below so departs from accepted judicial proceedings as to call for review on Certiorari in the exercise of this Court's supervisory powers.

CONCLUSION

There is no other adequate means to obtain the legal relief petitioner desires. The right to issuance of the writ is clear and indisputable. For the foregoing reasons the writ should be granted recalling the mandate.

Petitioner further requests that the Court grant petitioner such other and further reliefs it may deem to be just and equitable.

Respectfully submitted,

Sidney Gelb April 15, 1997

Sidney Gelb Date
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Counsel for Petitioner

APPENDIX

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UNITED STATES COURT APPEALS
For The District Of Columbia Circuit

No. 95-5200 September Term, 1996
92cv01729

Sidney Gelb, Appellant,

v.

Donna E. Shalala, Secretary, Department of Health and Human Services, Appellee

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

FILED
FEB 21 1997
CLERK

BEFORE: Silberman, Ginsburg and Randolph, Circuit Judges

ORDER

Upon consideration of the motion to correct the record non-notification of order, which is construed as a motion to recall the mandate, it is

ORDERED that the petition be denied. As appellant learned of this court's denial of rehearing on November 5, 1996, and the time for filing a petition for a writ of certiorari expired on December 20, 1996, appellant has not shown "exceptional circumstances" for why he was unable to file a timely petition for a writ of certiorari. See Johnson v. Bechtel Assoc. Professional Corp., 801 F. 2d 412, 415-16 (D.C. Cir. 1986).

FOR THE COURT: Mark J. Langer, Clerk

UNITED STATES COURT APPEALS
For The District Of Columbia Circuit

No. 95-5200 September Term, 1996
92cv01729

Sidney Gelb, UNITED STATES COURT
Appellant, OF APPEALS
DISTRICT OF COLUMBIA
CIRCUIT

v. FILED
SEP 20 1996
CLERK

Donna E. Shalala, Secretary,
Department of Health
and Human Services,
Appellee

BEFORE: Silberman, Ginsburg and Randolph,
Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed August 2, 1996, it is
ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5200 September Term, 1995
92cv01729

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
FILED
JUL 2 5 1996
CLERK

Sidney Gelb,
Appellant

v.

Donna E. Shalala, Secretary, Department of Health and Human Services,
Appellee

BEFORE: Silberman, Ginsburg, and Randolph, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the oppositions thereto, and the reply, it is

ORDERED that the motion be granted. The district court correctly found that Gelb did not present a prima facie case of age discrimination and did not show that the Merit Systems Protection Board's decision was arbitrary and capricious. Moreover, the district court's judgement for the government on the retaliation claim was properly

based on appellants poor work performance, rather than any intent to retaliate against the appellant for engaging in protected activities. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980)

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

LHS DA HRR

FOR THE COURT:

Mark J. Langer, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIDNEY GELB,

Plaintiff,

v. Civil Action No. 92-1729 (NHJ)

DONNA SHALALA,

Defendant.

FILED
SEP 9 1994
CLERK, U. S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of plaintiff's "motion to demand jury trial," it is this 9th day of September, 1994,

ORDERED that the motion be, and hereby is, denied.

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

NO. 95-5200 92CV 01729

Sidney Gelb, :
Appellant :
v. : January 28, 1997
:
Donna Shalala, Secretary of the :
Department of Health and :
Human Services, :
:
Appellee. :
:

MOTION TO CORRECT THE RECORD
NON-NOTIFICATION OF ORDER

Appellant filed a pro se petition for rehearing on August 2, 1996 concerning the order issued Jul 25, 1996.

This court issued an order, that denied appellants petition for rehearing filed pro se, on SEP 20, 1996.

Appellant was not timely served by mail or notified of this decision by this court. Not until appellant called the clerks's office of this court and spoke to his former attorney on November 5, 1996 did he learn that the motion for rehearing was denied.

Appellant called this courts clerks office and was told the notice was probably sent to the attorney and not to appellant, even though the motion was filed pro se. The former attorney never mailed or contacted appellant of this order because he thought he had no more work to perform.

Appellant filed a writ of certiorari on January 17, 1997 at the Supreme Court since he was told that he had until February 3, 2

1997 to file, 90 days after the November 5, 1996 notification from the court of appeals. The Supreme Court clerk's office said the 90 days tolled from SEP 20, 1996 not NOV. 5, 1996, when appellant was actually notified.

Appellant requests this court to issue an order letter stating that appellant was not notified until NOV. 5, 1996 permitting him to file his certiorari writ timely and correct the record.

Appellant is not an attorney and requests the proper remedy for this error in the form of an order or letter dated NOV. 5, 1996 instead of SEP 20, 1996.

Respectfully submitted,

_____ _____

Sidney Gelb, Pro Se Date
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